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**IN THE SUPREME COURT OF TONGA**
**APELLATE JURISDICTION**
**NUKU'ALOFA REGISTRY**

**AM 21 of 2019**

BETWEEN:

**POLICE** Appellant

-and-

**SIONE VUNA FA'OTUSIA** Respondent

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# JUDGMENT

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BEFORE: LORD CHIEF JUSTICE WHITTEN

Counsel: Mr T. 'Aho of the AGO for the Appellant

Mr S. Fonua for the Respondent

Date of hearing: 19 March 2020 and 23 April 2020

Date of judgment: 29 April 2020

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29 APR 2020

## Introduction

1. At all material times, the Respondent is and was the Minister of Justice.

2. On 12 January 2019, during a police investigation into a stolen cow, and following three police officers retrieving the cow from the property of Faioso Vake, who said he bought the cow from a police officer named Viliami Nusi, the Respondent is alleged to have telephoned the police officers involved and said:

> *"Why did you take Faioso's cow? And stop working like a tough guy before I shoot the shit out of a Police and had Faioso found you all at his farm, he would have shot the shit out of you."*

3. After hearing that, it is alleged that the officers felt threatened and decided to cease working on the case for that day because they felt it was unsafe to do so.

4. A new investigation team was appointed, and on 2 February 2019, the Respondent was charged with offences under sections 57 and 65 of the *Criminal Offences Act* ("the Act").

5. On 22 October 2019, at the preliminary enquiry of the said charges, counsel for the Appellant made no case submissions in respect of both charges. Principal Magistrate Mafi rejected the submission in respect of s.57 but upheld the submission in respect of s.65 and thereby determined not to refer that charge to the Supreme Court.

6. Both decisions have been appealed.

7. On 25 March 2020, I delivered judgment in AM 15 of 2019 in which I upheld the Magistrate's decision (refusing the no case submission) in respect of the s.57 charge.

8. This proceeding concerns his decision in respect of s.65.

9. A hearing was conducted on 19 March 2020 in respect of both appeals following submissions filed on 28 February 2020 and 4 March 2020 (on this appeal). The hearing of this appeal was adjourned part heard upon a grant of leave for the Crown to amend the Notice of Appeal. Directions were made for the filing of an Amended Notice of Appeal and supplementary submissions on the amended ground of appeal. The Amended Notice of Appeal and supplementary submissions on behalf of the Appellant were filed on 1 April 2020. The Respondent's supplementary submissions were filed on 15 April 2020. The resumed hearing took place, and was completed, on 23 April 2020.

## Amended Notice of Appeal

10. By Amended Notice of Appeal filed on 1 April 2020, the appeal proceeds on two grounds, namely, that the Magistrate erred in:

    (a) interpreting s.65 as only applying "*to interference with Judicial procedures, which commences only after laying Judicial charges*" (paragraphs 19 to 22 of the decision); and

    (b) determining that there was no evidence of "*people cooperating with the accused*" or the accused's "*state of mind and intention*" in relation to any attempt "*which was intended for the achievement of a certain result, to affect the work that was carried out*" (paragraphs 23 to 26 of the decision), contrary to s.32(4) of the *Magistrates Court Act*.

## Section 65 of the *Criminal Offences Act*

11. Section 65 is within Part VIII concerning offences against justice, the public peace, and public morals. It provides:

> ***Interference with course of justice***
>
> *Every person who conspires or attempts to interfere wrongfully in any manner with the course of justice in any matter, civil or criminal, shall be liable to imprisonment for any period not exceeding 5 years.*

***Decision below***

12. The learned Principal Magistrate decided that s.65 only applies to judicial procedures after a charge has been laid. His reasons included:

> *"(18) But take note of this, there is no other Law, or offence in the Laws of Tonga which mentions or assists with the interpretation of 'interfere wrongfully with the course of justice' in the discharge from any other law in the Tongan language, just the marginal note, or short title, which is used by the Defence. It is not necessary that we research international laws, and international case laws but the interpretation of the Tongan language version of the law.*
>
> *In addition to the interpretation -*

*(19) If one is to read sections 53-58 at once, of the Criminal Offences Act one gathers the thought that the offences charged therein relate to the conduct of individual persons. If one is to read section 63-68 also of the Criminal Offences Act at once, it is apparent that it intends to lay charges for conduct that may affect judicial procedures. This view supports the submission by the Defence, that section 65 points at Judicial procedures, and not police work.*

...

*(22) Based on the statement I've made above, I trust that the Defence's interpretation is accurate - that section 65 CAP 18 refers to interference with Judicial procedures, which commences only after laying Judicial charges...."*

***Submissions***

13. On the no case submission below, the Prosecution submitted, inter alia, that:

> *"(5) The course of justice involves the whole criminal procedure relating to any alleged criminal offending, starting from the investigation, charging, prosecution, sentencing, if applicable, and any appeal, if applicable."*

14. On this appeal, the Appellant submits, in summary that:

(a) the Magistrate took a rudimentary approach to the statutory interpretation of s.65 which lacked any attempt to analyse the text, context and purpose of the provision, as explained in *R v Tu'ivakano* [2020] TOSC 5;

(b) the relevant words are plain and unambiguous and are capable of a broad interpretation;

(c) there is nothing in the words to suggest they are limited to interference after the commencement of criminal charges;

(d) the Magistrate appeared to have been heavily influenced by one word in the heading to the Tongan version of the section – 'Fakamau'anga' - which literally means 'court';

(e) the approach taken and conclusion reached by the learned Magistrate, informed by the Tongan word for 'court' in the heading to the section, was not supported by any authorities locally or at common law;

(f) given the context of s.65 within Part VIII, the Magistrate should have given the word 'Fakamau'anga' a broader meaning of 'justice' given that courts are accepted to be the administrators of justice;

(g) there is Australian and New Zealand authority for the proposition that the offence of attempting to pervert the course of justice can be committed before the institution of judicial proceedings: *R v Rogerson* (1992) 174 CLR 268 at 277; *R v Beckett* (2015) 256 CLR 305; *R v Hong Sheng Kong* [2011] NZCA 537;

(h) the Respondent's (as a Minister of the Crown and in particular one responsible for the administration of the courts) alleged admonition and threat to shoot police officers, who were investigating the theft of a stolen cow:

(i) was an attempt to deny the court's knowledge of the true circumstances of the case;

(ii) had a tendency to deflect the police from prosecuting; and

(iii) accordingly, may be found to be an attempt to pervert the course of justice.

15. Counsel for the Respondent submitted that the learned Magistrate was correct in his interpretation of s.65 for reasons which may be summarised as follows:

(a) per Mason CJ in *R v Rogerson* (1992) 174 CLR 268 at page 276: "the course of justice begins with the filing or issue of process invoking the jurisdiction of a court or judicial tribunal or the taking of a step that marks the commencement of a criminal trial" and McHugh J at page 303-4: "It follows for the purpose of the offence of perverting the course of justice, the course of justice does not commence in criminal proceedings until the laying of an information against or arrest of an accused person" as approved by the Supreme Court of Western Samoa in *Police v Nauer* [2002] WSSC 10;

(b) the Magistrate's interpretation was consistent with the Tongan interpretation of the heading to s.65 which reads "Interference with the work of court";

(c) s.21 of the *Interpretation Act* permitted the Magistrate to give precedence to the Tongan version; and

(d) by that approach, the "course of justice" means "court procedure" and does not include police investigation.

16. During the course of further oral submissions, it was identified that while the Tongan version of the heading used the word "court", within the body of s.65, the reference to "course of justice" (not 'court') was the same in both the Tongan and English versions.

***Interpretation of "course of justice"***

17. The learned Magistrate did not seek to undertake any explicit exercise in interpreting the words "course of justice" using any tools or approaches such as those discussed recently in *Rex v Tu'ivakano* [2020] TOSC 5.

18. Instead, he appeared to be guided, significantly if not entirely, by the word "court" in the heading to the Tongan version of s.65.

19. The *Interpretation Act* is silent on the use of headings (or 'short titles' as both the learned Magistrate and Mr Fonua described them[1]) as aids to statutory interpretation.

20. In the UK, cross-headings attached to Parts (or Chapters of Parts) of Acts or groups of provisions may be used to assist with interpretation, but only so far as they provide a reliable guide to the material to which they are attached: *Dixon v BBC* [1979] 2 All ER 112, CA; *Customs and Excise Commissioners v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 All ER 501, CA. Their function is merely to serve as a brief, and therefore necessarily imprecise, description of that material: *DPP v Schildkamp* [1969] 3 All ER 1640, HL. Where a heading differs from the material it describes, the court is put on inquiry, but it is unlikely that the plain, literal meaning of the words of an enactment would be overridden purely by reason of a heading: e.g. *Fitzgerald v Hall, Russell & Co Ltd* [1969] 3 All ER 1140, HL.

21. In *Silk Bros Pty Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 at 16, Latham CJ said:

> *"The headings in a statute ... can be taken into consideration in determining the meaning of a provision where that provision is ambiguous, and may sometimes be of service in determining the scope of a provision... 'But where*

[1] "The heading or long title of an Act is to be distinguished from the short title, which is conferred on an Act for purposes of identification": annotations to 96 Halsbury's Laws (5th edn reissue), para 201 et seq.

> *the enacting words are clear and unambiguous, the title, or headings, must give way, and the full effect must be given to the enactment' (Bennett v Minister for Public Works (NSW) (1908) 7 CLR 372 at 383).*"

22. In Australia, s.13(2) of the Commonwealth *Acts Interpretation Act* 1901 excludes headings to sections from the material that forms part of a statute (as opposed to headings to Chapters, Parts, Divisions and Subdivisions). Similar legislation applies in the States and Territories. In New Zealand, s.5 of the *Interpretation Act* 1999 provides that section headings are indications "that may be considered in ascertaining the meaning of an enactment". In the event of inconsistency, the more detailed substantive provisions of the section prevail.

23. Returning to the present case, the learned Magistrate gave primacy to the Tongan words in the heading: "work of Court", as they differed from the English version: "course of justice".

24. Section 21 of the Tongan *Interpretation Act* provides that where it appears to a court that the Tongan language version of a provision in an Act differs in meaning from the English language version of that same provision, not by reason of any 'simple clerical error or error in translation', the court shall treat the Tongan language version of that provision as giving the true meaning of the law.

25. The important word in s.21 is "provision". In my view, a heading to a section is not a "provision". It is the substantive text of the section that provides what Parliament intended to be statutory law on a particular issue. It is that substantive text which is the "provision".

26. In that regard, it is not apparent from the learned Magistrate's reasons that he recognised that the body of the provision (as opposed to the heading) contained the same relevant language – "course of justice" – in both the Tongan and English versions. In that sense, there was no difference which compelled a preference for the Tongan heading to determine the meaning and scope of the substantive text of the provision.

27. The learned Magistrate also opined that there was no need to look outside of Tonga for decisions on what was meant by "course of justice" (or presumably "work of the court"). However, he did not identify (and apparently was not directed to) any decision within Tonga which might have elucidated the issue.

28. It was common ground here that there are no published Tongan decisions on this issue.

29. However, that is not to say there have been no previous decisions concerning offences against s.65. For example, in:

    (a) *Pouvalu v R* [2009] Tonga LR 364, the appellant made a misleading statement to police about repairs to a motor vehicle;

    (b) *Tu'akalau v Rex* [2014] TOCA 16, a former police officer prepared a file in which she placed a forged and backdated statement, and when detected, was complicit in giving a sum of money to the complainant in an attempt to settle the complaint; and

    (c) *R v Fukofuka* [2019] TOCA 11, an accused threw away to hide a rifle that was used in a shooting.

30. This issue was neither raised in any of those cases. It was either not considered or it was accepted, without analysis, that the offence could apply to conduct prior to the commencement of any judicial proceedings. In any event, an authoritative statement on the question is now required.

31. The determination of the meaning of technical legal words in statutes is a question of law,[2] and where a basic legal term with an established legal meaning is used, it should be understood in that sense unless a contrary intention clearly appears from the context.[3]

32. As will be seen below, the phrase "course of justice" is so ubiquitous, foundational and steeped in legal tradition that, over time, the common law has given it a particular interpretation or application specifically in the context of the criminal offence of attempting to pervert (or interfere with) the course of justice. That developed understanding and application exceeds any granular analysis of text, context and purpose. Any interpretation produced by definitions of the individual words do not produce a satisfactory answer to the question on this limb of the appeal. The real question therefore becomes not so much "what does the phrase mean?" but rather "what are the circumstances in which an attempt to pervert (or interfere with) the course of justice can occur?".

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[2] See e.g. *Brand & Media Pty Ltd v Aeropack Australia Pty Ltd* [2008] NSWSC 1095.

[3] *Rosebridge Nominees Pty Ltd v Commonwealth Bank of Australia* (2008) 36 WAR 561.

33. In the absence of any authoritative statement in Tonga, the common law of England is to be applied[4] and judgments of superior courts of Commonwealth territories may be persuasive.[5]

*United Kingdom*

34. The UK equivalent offence is commonly referred to as perverting (or attempting to pervert) the course of justice'.[6]

35. In *R v Selvage and another* [1982] 1 All ER 96, it was held that an act cannot have a tendency to pervert the course of justice unless proceedings of some kind are in being or are imminent or an investigation is in progress which might bring about proceedings, so that a course of justice had been embarked on. Watkins LJ gave an illustrative list of instances of perverting the course of justice including:[7]

> *"... giving false information to the police with the object of among other things putting the police on a false trail, obstructing the police in their inquiries into crime, the destruction of or other interferences with evidence and bringing wrongful influence to bear upon witnesses or potential witnesses."*

36. *Selvage* was applied in *R v Rafique* [1993] 4 All ER 1, a case involving the disposal of a gun after an accidental shooting.

37. Therefore, the offence is not limited to matters directly concerning proceedings already in being; nor need proceedings of some kind in a court or judicial tribunal be imminent; nor is it necessary that investigations which could result in proceedings are in progress. Provided that there is the requisite tendency and the requisite intention, the offence can be committed after the perpetration of a crime, but before investigations into it have begun: Halsbury's Laws of England.[8]

38. Further, the offence can be committed even though a crime has not been committed (or cannot be proved) if the defendant believes that there may be an investigation which could result in judicial proceedings. Even if a police investigation establishes that no offence

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[4] Sections 3 to 5 of the *Civil Law Act*; *Leiola Group Ltd v Moengangongo* [2010] TOCA 10.
[5] s.166 of the *Evidence Act.*
[6] Criminal Justice and Public Order Act 1994, Section 51.
[7] At p.379H.
[8] Criminal Law (Volume 25 (2016), paras 1–418; Volume 26 (2016), paras 419–860): 11. Offences Relating to the Administration of Justice, (3) Obstructing the Course of Justice, 795. Perversion of the course of justice.

has been committed, the enquiry is still part of the administration of justice. The concealment or destruction of evidence relevant to an investigation is clearly an act which has a tendency to pervert an investigation by turning it from its right course. To hold otherwise would mean that a person who destroyed the only evidence of the crime before an investigation began could not commit the offence: Archbold, *Criminal Pleading, Evidence and Practice,* 2009, Chapter 28, citing *R v Kiffin* [1994] Crim LR 449, CA. See also *R v Cotter* [2002] 2 Cr App R 29.

39. More recently, in *Director of Public Prosecutions v. SK* (2017) 181 JP 197 [2016] EWHC 837, the UK High Court confirmed that the process of investigation, whether or not charges result,[9] and the prospect of a police investigation being set in train, is sufficient.[10] It is not necessary to identify the precise proceedings which might ensue. It is sufficient if the act might mislead the court in all or any of criminal, civil or coronial proceedings.[11]

*Australia*

40. The position in Australia is marked by the seminal decision in *R v Rogerson* (1992) 174 CLR 268. By a majority decision, (Mason CJ, Brennan and Toohey JJ with apparent approval by Deane J; McHugh J dissenting), the High Court of Australia held that the offence of attempting or conspiring to pervert the course of justice can be committed at a time when no curial proceedings are on foot. That is because action taken before curial or tribunal proceedings commence may have a tendency and be intended to frustrate or deflect the course of curial or tribunal proceedings which are imminent, probable or even possible. In other words, it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceeding before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency.

41. Brennan and Toohey JJ (and McHugh J) did not agree with the reasoning in some earlier decisions in the UK such as *Selvage*, and New Zealand, which had led to the above conclusion. Their Honours opined that the course of justice does not begin until the jurisdiction of some court or competent judicial authority is invoked. Although they

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[9] *R v Kiffin* [1994] Crim LR 449.
[10] *R v Rafique & Ors* [1993] QB 843 and *R v Cotter, Clair & Wynn* [2003] QB 951.
[11] *R v Sinha* [1998] Masons CLR Rep 35, [1995] Crim LR 68.

considered that police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, they did agree that an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice.

42. Therefore, an act which has a tendency to deflect the police from prosecuting a criminal offence or instituting disciplinary proceedings before a judicial tribunal, or from adducing evidence of the true facts, is an act which tends to pervert the course of justice and, if done with intent to achieve that result, constitutes an attempt to pervert the course of justice. It impairs the court's capacity to do justice in the actual circumstances of the case.

43. More recently, in *The Queen v Beckett* (2015) 256 CLR 305, French CJ, Kiefel, Bell and Keane JJ. confirmed and explained *Rogerson* as acknowledging that a person may attempt or conspire to pervert the course of justice at a time when no curial proceedings are on foot, not because police investigations form part of "the course of justice", but because conduct may have the tendency, and be intended, to frustrate or deflect proceedings that the accused contemplates may possibly be instituted.[12]

*New Zealand*

44. In *Reg. v. Kane* (1967) NZLR 60, the New Zealand Court of Appeal upheld a conviction for attempting to defeat the course of justice where the appellant, who had been present at the stabbing of a youth, urged a witness to tell the police, when they came, that he was out of the room and knew nothing of the affair and also persuaded the offender to claim falsely that the stabbing was wholly accidental. McCarthy J., who gave the judgment of the Court, said that it was correct that the charge "does not lie on every occasion when the police are misled by false information wilfully given" (95) ibid., at p 63. But his Honour said that:

> *"... where in fact a crime had occurred, the police were in the process of investigating it, and the accused's conduct was aimed at preventing or obstructing a prosecution which he contemplated might follow, it seems to us that, at least when that situation exists, the offence of attempting to pervert the course of justice lies at common law."*

[12] [27] to [34].

45. In *Field v R* [2011] 1 NZLR 784, the Court of Appeal adopted *Rogerson*[13] and applied its earlier decisions in *Meyrick*[14] and *McMahon*[15] in holding that for the purpose of the offence of perverting the course of justice, the "course of justice" meant the process of administering justice, including the prosecution of criminal offending and any court proceedings which followed, but did not include police or other investigations. However, where an accused knows a crime has possibly been committed and/or knows of an investigation into a possible crime, interference with that investigation with a view to adversely affecting criminal proceedings that had been instituted, or that the accused contemplates might follow, did amount to an offence.

46. The same reasoning and earlier decisions were applied in *R v Hong Sheng Kong* [2011] NZCA 537 and, more recently, in *Chen v R* [2019] NZHC 2519.

*Canada*

47. In Canada, the authorities uniformly support an interpretation of the phrase "the course of justice" as including the investigatory stage. In *Kalick v. The King* (1920) 55 DLR 104,[16] a bribe to a policeman to induce him not to prosecute for an offence was held to be a corrupt interference with the due "administration of justice". Anglin J. said, at p 109:

> *"It is quite immaterial whether the police officer actually intended or contemplated instituting a prosecution. It suffices that the appellant gave the bribe with intent to head off such a proceeding. The due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking*[17] *one already begun."*

48. The "course of justice" has been held to be even broader in meaning than the "administration of justice": *R. v. Wijesinha* [1995] 3 SCR 422.[18]

49. *Kalick* has been applied in a number of Federal and provincial decisions. In *R. v. Spezzano* (1977), 1977 CanLII 1371 (ON CA), Martin J.A. concluded that the expression "course of justice" includes judicial proceedings existing or proposed but is not limited to such proceedings. The offence also includes attempts to obstruct, pervert or defeat a

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[13] [1992] 174 CLR 268
[14] [2008] NZCA 45
[15] [2009] NZCA 472
[16] Referred to in *Rogerson*.
[17] To suppress, stifle or extinguish quietly.
[18] In which *Rogerson* was applied.

prosecution which the accused contemplates may take place, notwithstanding that no decision to prosecute has been made. See also *R. v. Watt* 2015 BCPC 97.

***Conclusion***

50. Based on the above statements of principle, I consider that the learned Magistrate erred in the view that s.65 can only apply to 'Judicial procedures' meaning after a charge is laid.

51. In my view, the correct interpretation, consistent with and synthesised from the above authorities, is that an offence of attempting to interfere with the course of justice under s.65 may arise where an act occurs:

    (a) that has a tendency to interfere with the course of justice; and

    (b) with intent to achieve that result; and

    (c) at any time when proceedings of some kind have been instituted or are imminent or an investigation is in progress which might bring about such proceedings, or if the defendant believes that there may be an investigation which could possibly result in judicial or other legal proceedings (even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency).

52. Acts which have a tendency to interfere with the course of justice, so described, include those which:

    (a) frustrate or deflect police from prosecuting a criminal offence or instituting proceedings;

    (b) destroy, prevent, inhibit or interfere with evidence of the true facts being adduced; or

    (c) otherwise mislead a court (or a tribunal) or impair its capacity to do justice in the actual circumstances of the case.

## Section 32(4) of the Magistrates Court Act

53. The Principal Magistrate also decided that there was no case for referral because he considered that there was no evidence of:

(a) any 'conspiracy'; or

(b) any "attempt", referring to intention or the accused's state of mind.

***Submissions***

54. The Appellant contends, in summary, that:

(a) the Magistrate acted contrary to s.32(4) of the *Magistrate's Court Act* which requires a Magistrate to only rule on whether the documents tendered at the committal hearing disclose a sufficient case to put the accused on trial before the Supreme Court; and, that instead, he conducted an analysis of the evidence. In so doing, the Magistrate did not follow the prescriptions for 'paper only' committals as explained by Cato J in *Hala'ufia v Police & ors* (AM 8 / 2013):

> *"[23] Section 9 of the Amendment act introduced a new procedure for the conduct of preliminary hearings in Tonga. It completely eliminated cross-examination of witnesses. The procedure is that the Crown case will be presented by way of a paper committal only. This consists of a copy of a fair summary of the statements of the prosecution witnesses, a copy of the list of exhibits and a copy of the documentary exhibits. Copies of these documents are given to the defendant at the preliminary enquiry. If the Magistrate considers that the documents disclose a sufficient case to put the accused upon trial before the Supreme Court, then the defendant is committed for trial. Unlike the old committal proceedings, which provided for an oral committal hearing where evidence was adduced and a defendant could cross-examine witnesses and call evidence on the enquiry, the issue of sufficiency is decided entirely on the documents produced by the Crown. There is no room at all for a Magistrate to decide whether to commit or not other than on the documents advanced at the hearing by the Crown."*

(b) the learned Magistrate did not decide the Respondent's no case submission in accordance with:

(i) Practice Direction 1 of 1992 which provides:

*"When such a submission is made, the sole function of the Magistrate is to consider whether there is sufficient evidence which, if believed, would entitle the Court to convict. The issue then is one of sufficiency only. The credibility (of witnesses) or reliability (of evidence) are not material factors at this stage of proceedings.... Adapting the words of the Court of Appeal in* ***R v Galbraith*** *[1981] 2 All ER 1060 to 1062 to the Tongan context:*

*Where the evidence of the prosecution is such that its strength or weakness depends on the view to be taken of a witness's reliability (or other matters, such as credibility, which are generally speaking within the province of the "jury") and where, on one possible view of the facts, there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the Magistrate should allow the case to be tried and refuse the submission of no case to answer."*

(ii) *Police v Talamai* (AM 7 / 2018), where Cato J stated:

*"The test for sufficiency as I explained in Police v Hala'ufia and others, was whether the evidence called by the prosecution reached the threshold of; at its highest, would allow a properly directed jury to convict. If there is evidence of this quality then the case should be committed: Galbraith (1981) 73 Cr App R 124. The Magistrate himself should not attempt to evaluate the evidence and, indeed, cannot do so in the absence of the witnesses being called to give their evidence with their reliability assessed after cross examination and considered with all the other evidence adduced."*

(c) the conduct of the Respondent, when viewed objectively, had a tendency to interfere with the course of justice in that the language he used was a positive act which, when taken at its highest, was an attempt by the Respondent to frustrate an ongoing police investigation into finding the truth as to who had stolen the cow, and the Respondent intended for that to be the result;

(d) in light of the information from the three police officers that they felt threatened by what the Respondent allegedly said to them and, as a result, discontinued their investigation, the Magistrate should have referred the matter to the Supreme Court for trial;

(e) instead, the Magistrate undertook an analysis of all the essential elements of the offence and the evidence to prove those elements, in order to determine whether there was sufficient evidence for the matter to be committed;

(f) while there is nothing wrong per se with that approach, the Magistrate fell into the trap of inadvertently putting himself in the place of the jury in prejudging a case during the committal hearing; and

(g) whether the Respondent had the necessary mental element is a matter for a jury and not a Magistrate on a 'documents only' committal.

55. The Respondent's submissions on this limb of the appeal may be summarised as follows:

(a) there was no evidence of a conspiracy;

(b) there was no evidence that Respondent's alleged phone call to the police officers was 'wrongful' or 'unlawful';

(c) there was no evidence that the accused "had intended for the achievement of certain results to affect the work that was carried out" or as the Papua New Guinean National Court of Justice said in *State v Kiliki* [1990] PNGLR 216 "... an attempt to turn aside the course of justice from its proper direction; or to influence a tribunal or court so as to lead it astray from its proper conduct, its duty under the law";

(d) further, in the absence of direct evidence of intent such as the Respondent saying words to the effect that he wanted the police to cease their investigation, the words he allegedly did use could only be regarded and expressing his anger and not an intention to interfere with the course of justice; and

(e) finally, if the police officers did not obtain a search warrant prior to entering Faioso's property to retrieve the cow, and if the 'course of justice' is to include police investigations, 'police will have too much power which is likely to be abused'.

***Conspiracy***

56. Mr Fonua contended that the learned Magistrate was entitled to dismiss the charge solely on the basis that there was no evidence of conspiracy. With respect, the submission misreads the opening words to s.65. Further, the consideration by the Magistrate of this limb of the section was, and the present supporting submission is, misconceived and irrelevant to the actual offending alleged by the Crown.

57. The use of the disjunctive "or" in the words "*Every person who conspires **or** attempts to interfere...*" means that a number of persons may be charged with conspiring to interfere with the course of justice; ***or***, one person may be charged, by that person alone, attempting to interfere with the course of justice. The instant case is an example of the latter. There is no suggestion in the particulars of the charge that the Respondent was acting with others when he made the relevant phone call.

58. Accordingly, if the learned Magistrate determined to dismiss the charge on this basis, he erred in doing so.

***'wrongfully'***

59. Section 65 prohibits interference with the course of justice which is wrongful. Mr Fonua submitted that the words allegedly used by the Respondent here were not wrongful and that he was simply expressing his dissatisfaction with the police conduct on behalf of one his constituents.

60. The submission must be rejected. If a properly directed jury accepts the police version of what the Respondent allegedly said, then it would in my view also be open to a jury to regard even just the words in which the Respondent threatened to shoot police as constituting a wrongful interference.

***Whether the evidence before the Magistrate disclosed a sufficient case on intent?***

61. In 2012, s. 32 of the *Magistrates Court Act* was amended by s.9 of the *Magistrate's Court (Amendment) Act* 2012. As explained in *R v Fukofuka* [2019] TOCA 11 at [23], those amendments have:

> *"... streamlined the committal process by allowing a Magistrate to make a determination on the papers. The process is further prescribed in section 32. In terms of s.32(4)(c), if the Magistrate considers the documents presented disclose 'that a sufficient case has been made out to put the accused upon his trial before the Supreme Court' the Magistrate must commit him for trial accordingly. If the Magistrate is not so satisfied the accused must be discharged: s.32(4)(d). ... "*

62. The ability of a Magistrate to determine whether, on a documents-only committal, there is sufficient evidence on the element of intent, is necessarily limited.

63. An inquiry into the state of mind of the accused at the relevant time will involve a consideration of all the facts that are established in evidence in order to ascertain whether those facts demonstrate that the accused's intention at the time he made the statement was the intention required by s.65: *R v Tu'ivai* [2006] Tonga LR 310. Proof of a person's motives for doing an act may found the basis for an inference as to the intent with which the act was done; but, in this context, all that is necessary is proof of knowledge of all the material circumstances and the intentional doing of an act having a tendency, when objectively considered, to pervert the course of justice: *Attorney General v Butterworth* [1963] 1 QB 696 at 726; *R v Meissener* (1995) 130 ALR 547. Judges are regularly instructed to avoid any elaboration or paraphrase of what is meant by intent and leave it to a jury's good sense to decide whether the accused acted with the necessary intent: *R v Moloney* [1985] A.C. 905 HL.[19]

64. Here, if, as Mr Fonua's contended,[20] the learned Magistrate dismissed the charge because there was no direct or explicit evidence of intention to interfere with the police investigation, such as the Respondent (as Minister of Justice) telling the police to cease or discontinue their investigation or not to charge anyone, then in my view, he erred in doing so. If that were the correct approach to assessing offences involving state of mind, the vast majority would be dismissed with resulting widespread injustice.

65. The correct approach was to look at all the relevant evidence before the court such as the words allegedly used, the context in which they were said, the position of the Respondent as Minister of Justice viz a vis the police, and the evident knowledge of the Respondent (presumably from information provided by Faioso) of the ongoing police investigation, and ask (in a 'Galbraith' sense) whether, if accepted, a properly directed jury could be satisfied that the Respondent intended to interfere with the course of justice. Unless the answer to that enquiry was in the absolute negative, the learned Magistrate should have been satisfied, on that element, that there was a sufficient case to be referred to the Supreme Court.

66. In my view, the evidence before the learned Magistrate on the matters set out above, viewed objectively, clearly demonstrated a sufficient case for referral. Thereafter, it will

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[19] See also *R v Hancock and Shankland* [1986] A.C. 455 HL; *R v Nedrick* 83 Cr App R 267, CA; *R v Woolin* [1999] 1 A.C. 82 HL.

[20] During oral submissions, Mr Fonua confirmed that he did not make this submission below.

be a matter for a jury (or judge alone, if the Respondent so elects) to consider all the evidence actually given at trial, which will invariably be tested through cross-examination (something not available to a Magistrate on a preliminary enquiry), to determine whether the necessary intent is established to support a conviction or not.

***Illegal search – "The Might of the state v Individual Rights"***

67. Finally, the Respondent contends that if the police did not obtain a search warrant when they entered Faioso's land to retrieve the cow, then they were trespassers. On that basis, he says that, as Faioso's lawyer, he was entitled to telephone the police to express "dissatisfaction with the police's illegal act", and that that cannot be an interference with the course of justice.

68. The submission then attempted to walk the following metaphorical logic tightrope:

    (a) if police investigations are included in the 'course of justice'; and

    (b) police conduct illegal searches;

    (c) which result in persons who call the police to complain about their illegal conduct being charged,

    that would lead to abuse of police power.

69. With all due respect to Mr Fonua's innovation, for the following reasons, the submission may be succinctly dispatched:

    (a) The Magistrate decided not to rule on the point and that decision has not been appealed.

    (b) An allegation of illegal search cannot be determined on a no case submission, at a documents only committal, if based on evidence filed before the no case submission was known; it is a matter for trial.

    (c) Even if the allegation could be considered at committal, and a Magistrate was satisfied that a search was unlawful, the usual result is exclusion of certain material evidence obtained from the search. Here, Mr Fonua was unable to identify what that evidence might be or how exclusion of any such evidence might advance the submission of no case to answer on the s.65 charge.

(d) Mr Fonua mused with the possibility of some form of estoppel argument against the prosecution proceeding with the charge, but was unable, for now at least, to develop that analysis to a state for consideration on this appeal.

(e) Even if the allegation of unlawful search was established at committal, it would not necessarily follow that the Respondent could not be required to stand trial for an offence under s.65: compare *Attorney General v Tomasi* [2019] TOCA 19 at [12] and [13].

(f) Prima facie, a complaint to police that their investigation has allegedly involved unlawful activity, without more, is unlikely to possess the requisite tendency or intention to constitute an attempt to interfere with the course of justice. Here, the alleged words of the Respondent including telling the police to 'stop working like tough guys' and threatening to shoot them are, arguably, an example of something more than a mere complaint.

**Result**

70. For the reasons stated, the appeal on both grounds is allowed.

71. The decision of the Magistrates Court to dismiss the s.65 charge is reversed.

72. Pursuant to s.80 of the *Magistrates Court Act*, the Respondent is committed to stand trial before the Supreme Court on the s.65 charge.

73. At the conclusion of the last hearing, I raised with both counsel a number of questions consequential to the determination this appeal:

(a) Firstly, having regard to Practice Direction 1 of 1991 concerning trials of related charges, whether the s.57 charge the subject of appeal AM 15 of 2019 should be heard with the s.65 charge in the Supreme Court. The Appellant submitted that it should. The Respondent submitted that it should be heard in the Magistrates Court. Pursuant to s.80 of the *Magistrates Court Act*, and to avoid any risk of inconsistent verdicts arising from the same factual allegations, I consider it just to have both charges heard before the Supreme Court.

(b) Secondly, whether, pursuant to s.36 of the *Magistrates Court Act*, both charges should be remitted for trial before a Magistrate with enhanced sentencing power. The Appellant agreed to that course. The Respondent did not. As the section requires the consent of all parties, both charges will be tried in the Supreme Court.

(c) Thirdly, in that event, whether given the Respondent's position as Minister of Justice, an overseas judge should be appointed to hear the trial. Both counsel agreed that that course is appropriate.

74. Accordingly, the above procedural directions will be made in appeal AM 15 of 2019, and the Magistrates Court advised accordingly.

75. Both charges will be called for arraignment before the Supreme Court on 10 June 2020.

76. Indictment and summary of facts are to be filed on or before 27 May 2020.

NUKU'ALOFA
29 April 2020

M.H. Whitten QC
LORD CHIEF JUSTICE